



**National Trust *for*  
Historic Preservation**  
*Save the past. Enrich the future.*

August 20, 2018

Ms. Mary Neumayr, Chief of Staff  
Council on Environmental Quality  
730 Jackson Place, N.W.  
Washington, D.C. 20503

**RE: Advance Notice of Proposed Rulemaking  
40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506,  
1507, and 1508 [Docket No. CEQ-2018-0001]**

Dear Ms. Neumayr:

The National Trust for Historic Preservation in the United States (National Trust) offers the following comments in response to the Advance Notice of Proposed Rulemaking (Advance Notice) recently published by the Council on Environmental Quality (CEQ) indicating that revisions to the implementing regulations for the procedural provisions of the National Environmental Policy Act (NEPA) are under consideration. The National Trust offers the following comments with the goal of improving the effectiveness of NEPA.

### **Statement of Interest**

The National Trust is a private nonprofit organization chartered by Congress in 1949 to “facilitate public participation” in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. *See* 54 U.S.C. § 312102(a). Congress intended the National Trust “to mobilize and coordinate public interest, participation and resources in the preservation and interpretation of sites and buildings.” S. Rep. No. 1110, 81st Cong., 1st Sess. 4 (1949). With more than one million members and supporters around the country, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government.

The underlying goal of NEPA is to lead to better informed federal decision-making. The National Trust frequently participates in project reviews under

NEPA and has experienced firsthand how the statute’s “hard look” at alternatives can lead to improved decisions and win-win outcomes that protect natural and cultural resources while allowing projects to proceed. The existing NEPA regulations have proven to be more than adequate to satisfy the goals of NEPA. If CEQ decides to move ahead and revise these regulations, the National Trust believes that such changes should recognize that the existing regulations work well and only minor, targeted changes, such as those described below, should be made.

### **Revising the NEPA Regulations is Premature**

We are concerned that any effort by CEQ to revise its NEPA regulations is premature, given Section 1 of Executive Order 12,866. Section 1 states:

“In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, **including the alternative of not regulating**. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.”

58 Fed. Reg., No. 190 (Oct. 4, 1993) (emphasis added). The text of the Advance Notice does not indicate that this type of cost-benefit analysis has been completed. Instead, the Advance Notice indicates that CEQ is considering revising the NEPA regulations just because they have not been revised recently. There is no detailed information explaining why amending these regulations would be helpful or necessary to meet the goals of NEPA.

Under Office of Management and Budget policy, an important threshold question before an agency conducts a rulemaking is whether developing agency “guidance” would be a better option. From the text of the Advance Notice, it appears that this option has not been considered. Many of the National Trust’s answers to the questions in the Advance Rulemaking identify areas where agency guidance would be the best way to address any identified concerns. Overall, we believe that the existing NEPA regulations already

provide a solid foundation for NEPA reviews and that CEQ has not provided sufficient justification for why a regulatory overhaul would be warranted.

### **Increased Funding Should be Made Available to Support NEPA Compliance**

The National Trust believes that the current regulations provide clear directions and encourage agencies to work efficiently in implementing their obligations under NEPA. Over the decades since NEPA was enacted, agencies have developed and refined their own NEPA regulations, coordinating their reviews under various federal laws, and using available tools, like categorical exclusions and tiering, to streamline their review procedures. The result is that the preparation of detailed Environmental Impact Statements under NEPA is fairly limited. Despite this reality, NEPA has developed a false reputation for being a major cause of regulatory delay.<sup>1</sup>

When reviews under NEPA are delayed, the main cause is not inefficient regulation, it is inadequate funding.<sup>2</sup> Agencies that are understaffed or lack adequate training and expertise will struggle to implement regulations effectively, even if they are revised. In our view, the best way to improve NEPA implementation is to ensure that all agencies have the staff, experience, information technology, resource databases, and training to complete NEPA reviews expeditiously and without sacrificing quality.

### **Changing NEPA Regulations Will Result in Uncertainty**

Existing law under NEPA has been developed over decades and is a relatively settled area of the law. Major changes to the NEPA regulations are likely to result in uncertainty, new review processes, and increased litigation. Regulatory amendments are unlikely to speed up project reviews. Instead,

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<sup>1</sup> The Congressional Research Service has concluded that NEPA is not a major cause of project delay. Luther, Linda, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*. Congressional Research Service Report 7-5700 (2012) (available at [https://environment.transportation.org/pdf/proj\\_delivery\\_stream/crs\\_report\\_envrev.pdf](https://environment.transportation.org/pdf/proj_delivery_stream/crs_report_envrev.pdf)).

<sup>2</sup> A December 2016 report of the U.S. Department of Treasury, found that inadequate funding is “by far the most common challenge to completing” major transportation infrastructure projects. AECOM, *40 Proposed U.S. Transportation and Water Infrastructure Projects of Major Economic Significance*, Page 2 (2016) (available at <https://www.treasury.gov/connect/blog/Documents/final-infrastructure-report.pdf>).

they are likely to slow them down. Given that the existing regulations are already effective, CEQ should closely consider whether amendments are necessary.

### **NEPA is the Primary Mechanism that Facilitates Local Input into Federal Decisions**

One of the primary reasons for the passage of NEPA was the recognition that federal agencies need to take local concerns into account when making decisions. NEPA is intended to provide opportunities for communities to weigh in on projects before federal decisions that impact them are made. Despite NEPA's public participation requirements, achieving robust participation can be challenging. For example, agencies sometimes focus more on whether precise procedural steps are followed, rather than on whether meaningful public participation opportunities are afforded. Public participation that occurs *after* alternatives have already been developed and considered is another common problem. Any changes to NEPA's regulations regarding public participation should be focused on improving opportunities for the public to participate *early* in the federal decision-making process. Requiring federal agencies to actively solicit and consider input from the local communities that their decisions affect will lead to better outcomes.

### **Questions and Responses**

The National Trust offers responses to the following questions included in the Advance Notice:

**1. Should CEQ's NEPA regulations be revised to ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient, and if so, how?**

The existing regulations provide sufficient opportunities to coordinate NEPA reviews with reviews required by other federal laws. In fact, the regulations already require that "to the fullest extent possible," agencies prepare draft EISs "concurrently with and integrated with environmental impact analyses and related surveys and studies" required by other environmental laws. 40 C.F.R. § 1502.25. If CEQ has identified any specific needs for additional coordination, guidance can be developed on a case-by-case basis. One successful example of guidance being used to coordinate reviews is the

2013 handbook<sup>3</sup> developed jointly by CEQ and the Advisory Council on Historic Preservation that provides guidance to agencies to streamline and integrate project review under NEPA and Section 106 of the National Historic Preservation Act. This handbook could provide a model for CEQ to work with other federal agencies where a specific need to enhance coordination has been identified.

Additionally, before making any changes to address a *perception* that coordination needs to be improved, CEQ should first gather data from federal agencies and the public to identify any *actual* on-the-ground barriers to efficient coordination. This information could be used to identify areas where additional agency guidance would be beneficial.

**2. Should CEQ’s NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions, and if so, how?**

CEQ’s current regulations allow agencies to use existing, professional and reliable, environmental studies and analyses in their reviews under NEPA. Additional use of NEPA’s tiering process is another way that agencies can rely on analysis conducted in prior reviews. When used properly, this review mechanism can help to increase the efficiency and effectiveness of agency reviews under NEPA.

**3. Should CEQ’s NEPA regulations be revised to ensure optimal interagency coordination of environmental reviews and authorization decisions, and if so, how?**

CEQ’s existing regulations provide an effective framework for coordination between agencies. Like our answer to Question 1 above, if CEQ identifies a need for improved interagency coordination, CEQ should consider developing guidance specifically tailored to address the identified deficiency.

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<sup>3</sup> NEPA and NHPA, A Handbook for Integrating NEPA and Section 106; available at <https://www.achp.gov/digital-library-section-106-landing/nepa-and-nhpa-handbook-integrating-nepa-and-section-106>.

**4. Should the provisions in CEQ's NEPA regulations that relate to the format and page length of NEPA documents and time limits for completion be revised, and if so, how?**

CEQ's regulations already provide useful guidance and factors for agencies to consider when establishing timelines and page limits for individual projects. The current suggested page limits in 40 C.F.R. § 1502.7 are reasonable. Appropriately, the current regulatory language sets target page limits, but does not mandate arbitrary page limits for large or complex projects that require additional pages to conduct a full consideration. Likewise, the factors that agencies are to consider in setting review schedules (which are included in existing regulations) correctly recognize that prescribing compulsory time limits for all projects regardless of their complexity is too inflexible and unworkable in practice. 40 C.F.R. § 1501.8.

**6. Should the provisions in CEQ's NEPA regulations relating to public involvement be revised to be more inclusive and efficient, and if so, how?**

Yes. CEQ's regulations should be revised to clarify federal agencies' obligations regarding tribal consultation under NEPA. Revisions are needed in 40 C.F.R. §§ 1503.1(a)(2)(ii) and 1506.6(b)(3)(ii) regarding inviting comments from and providing public notice to Indian tribes. The current language limits the request for comments from Indian tribes to projects that may cause effects on tribal land within reservations. Federal agencies are responsible for considering impacts to tribally significant cultural resources whether they are located on or off reservation lands. This language should be modified to require agencies to request comments of Indian tribes and Native Hawaiian Organizations for any project that may impact resources of significance to those communities.

**Questions 7 & 8. Requesting suggestions for definitional changes or additions.**

The existing definitions of NEPA terms are clear and effective as is, and no additional terms need to be defined. The meaning of these terms is well understood by agencies and the public. Changes are unnecessary and likely to lead to confusion, and potentially to litigation.

**10. Should the provisions in CEQ's NEPA regulations relating to the timing of agency action be revised, and if so, how?**

The existing regulation at 40 C.F.R. § 1502.5 establishes a sound and reasonable approach for agencies to coordinate their NEPA review process to their decision-making regarding a proposed action.

**13. Should the provisions in CEQ's NEPA regulations relating to the appropriate range of alternatives in NEPA reviews and which alternatives may be eliminated from detailed analysis be revised, and if so, how?**

Changes to this regulatory section are not warranted and could create legal uncertainty, slow down the review process, and undercut the effectiveness of NEPA. Instead of regulatory changes, CEQ could consider developing guidance intended to help agencies better coordinate the development and consideration of alternatives, particularly at the early phases of review, i.e. during the pre-scoping and scoping process.

**15. Which provisions of the CEQ's NEPA regulations can be updated to reflect new technologies that can be used to make the process more efficient?**

There have been changes in technology that can help to increase the efficiency of permitting reviews under NEPA. The primary barrier to increased use of these technologies is a lack of funding, not a need for regulatory changes.

The most effective way to save time and money in reviewing impacts to historic resources under NEPA is to develop better 21<sup>st</sup>-century digital maps and databases that identify where historic and cultural resources have already been located and where more are likely to be found. Currently, much of the survey data about the location of important cultural resources (including previously completed state and federal surveys, and information about property boundaries for resources listed on the National Register of Historic Places or designated as National Historic Landmarks) is still stored in paper files and rudimentary databases in state, tribal and federal offices around the country.

Increased availability of survey data in digital formats could significantly reduce the cost and review time needed to consider impacts to historic

resources by making access to this information available electronically to agency staff. Improving the availability of cultural resource survey data would also ensure that resource type and location information was available at the earliest stages of project review. This would reduce the likelihood of resources being discovered late in the project review process and causing agencies to have to significantly revise their consideration of potential project alternatives.

The federal government should ensure that State Historic Preservation Offices (SHPOs) and Tribal Historic Preservation Offices (THPOs) have the resources to invest in digitized GIS-based databases. Fully funding the Historic Preservation Fund (HPF), which supports SHPOs and THPOs, would help enable this transition to new technology.

**16. Are there additional ways CEQ's NEPA regulations should be revised to promote coordination of environmental review and authorization decisions, such as combining NEPA analysis and other decision documents, and if so, how?**

Please see answer to Question 2.

**17. Are there additional ways CEQ's NEPA regulations should be revised to improve the efficiency and effectiveness of the implementation of NEPA, and if so, how?**

Please see answer to Questions 1 and 3.

**18. Are there ways in which the role of tribal governments in the NEPA process should be clarified in CEQ's NEPA regulations, and if so, how?**

As discussed in the answer to Question 6 above, CEQ's regulations should be amended to clarify agencies' responsibilities to invite comments and ensure the public involvement of tribal governments.

**19. Are there additional ways CEQ's NEPA regulations should be revised to ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, and if so, how?**

As discussed above, the key to increasing effectiveness and reducing any delays in NEPA reviews is to ensure that agencies have adequate funding, training and other necessary resources. Regulatory language changes do not address these types of lack of capacity issues, and may in fact exacerbate them by requiring retraining for existing staff.

**20. Are there additional ways CEQ's NEPA regulations related to mitigation should be revised, and if so, how?**

This is another area where developing additional guidance for agencies rather than revising regulations could be helpful. CEQ's existing guidance on "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact" is a helpful document, but could be expanded upon. To ensure appropriate mitigation outcomes, guidance stressing the importance of ensuring that mitigation commitments are monitored and enforced, could improve outcomes.

**Conclusion**

The National Environmental Policy Act and its implementing regulations play a key role in ensuring that the federal government carefully weighs impacts to natural and cultural resources prior to making decisions. The National Trust appreciates the opportunity to comment on the important issues raised in the Advance Notice. Please don't hesitate to contact us with any questions. We would be pleased to discuss any of the issues raised herein directly with CEQ staff.

Sincerely,



Sharee Williamson  
Associate General Counsel

CC: Ted Boling, Council on Environmental Quality  
John M. Fowler, Advisory Council on Historic Preservation